95-1439

(1)

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JOAN M. LAKOSKI, PH.D.,

Petitioner,

v.

THE UNIVERSITY OF TEXAS
MEDICAL BRANCH AT GALVESTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

Introduction: A member of the research faculty at a medical school sued for sex discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq. Suit was filed without the filing of a charge under Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §§ 2000e et seq. because the professor needed immediate injunctive relief to preserve her job. A jury found there was sex discrimination and judgment was entered for $250,000 in damages. The Fifth Circuit reversed and rendered, holding that because a remedy was available under Title VII there could not be an implied right of action for damages under Title IX.

Question: **Do remedies available for sex discrimination under Title VII of the 1964 Civil Rights Act preclude a suit for damages directly and exclusively under Title IX of the Education Amendments of 1972?**

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THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 66 F.3d 751 (5th Cir. 1995). Together with the judgment of the trial court and the order denying petition for rehearing and suggestion for rehearing en banc, the opinion is reproduced in the appendix.

JURISDICTION OF THIS COURT

Judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on October 3, 1995. An order denying petition for rehearing was entered December 12, 1995. For the reasons set forth herein, this court should exercise its jurisdiction for review on writ of certiorari in accordance with the statutory provisions of 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the provisions of § 901 of the Education Amendments of 1972, 20 U.S.C. § 1681(a), which, exclusive of the exceptions listed, which do not apply, provides as follows:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...

STATEMENT OF THE CASE

Joan M. Lakoski, Ph.D., joined the faculty of the University of Texas Medical

Branch at Galveston in 1984, as a tenure track assistant professor of pharmacology. In the next six years, she obtained almost $900,000 in federal research grants, and in 1990 she and other senior faculty obtained a $5 million grant, of which $1.2 million was Dr. Lakoski's share.

Despite her success in obtaining research funding and in gaining national and international recognition, Dr. Lakoski was denied promotion in 1988, 1989 and 1990. In February, 1991, she was bitterly and personally attacked in a letter containing numerous inaccuracies and false accusations. The author served as chair of a committee which that year denied tenure to Dr. Lakoski.

Faced with having to accept an offered non-tenured position at a reduced salary, under terms not generally applied at the medical school, or of having her employment ended, Dr. Lakoski, joined by another female faculty member, sued for sex discrimination under Title IX. Dr. Lakoski requested and obtained a preliminary injunction to preserve her employment and her case was severed from what remained as a class action, but later was settled with the remaining individual plaintiff. Dr. Lakoski did not pursue a charge of discrimination with the Equal Employment Opportunity Commission, as provided by Title VII of the 1964 Civil Rights Act, because she needed the preliminary injunctive relief which she obtained to keep her job. In contrast to Title VII, which requires that a complainant provide the E.E.O.C. six months to investigate and attempt conciliation before filing suit, Title IX contains no requirement of recourse to administrative remedies.

After a trial in which Dr. Lakoski presented evidence of being stereotyped and

subjected to standards not applicable to males, the jury found that she had been subjected to sex discrimination and set damages at $250,000. Dr. Lakoski accepted a remittitur of $100,000, and judgment was entered in her favor for $150,000 plus attorney's fees.

In its brief to the Fifth Circuit, p. 12, the medical school stated: "The University does not argue that Title VII pre-empts Title IX or that Title VII is the exclusive remedy for employment discrimination." Notwithstanding this disclaimer, the Fifth Circuit reversed and rendered judgment against Dr. Lakoski holding it was persuaded that Congress intended Title VII to exclude a damage remedy under Title IX for individuals alleging employment discrimination.

Argument

I. The Fifth Circuit decision on an important federal question conflicts with relevant decisions of the Supreme Court.

This court specifically held that Title IX explicitly confers a benefit on persons discriminated against on the basis of sex. Cannon v. University of Chicago, 441 U.S. 677, 694 (1979). Three years later, this court specifically held Title IX remedies applicable to employees. North Haven Board of Education v. Bell, 456 U.S. 512, 520-21 (1982). In 1992, this court held that the implied right of action to enforce Title IX found in Cannon includes a damages remedy. Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

This court's holdings that Title IX provides for an implied right of action, protects employees and allows for damages were considered by the Fifth Circuit a

beguilingly simple syllogism, 66 F.3d at 754, distinguishable from this case because there was no need to address Title VII, which, if implicated at all, hovered on the distant horizon. Id.

The distinctly applicable principles set by this court cannot be discounted so blithely, particularly because, as shown, Title VII was not presented by the medical school as the exclusive remedy for sex discrimination in employment or as preempting Title IX.

In reaching its conclusion, the Fifth Circuit misapplied this court's holding in Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 378 (1979). In Novotny, this court held that 42 U.S.C. § 1985, a remedial statute, could not be used to circumvent the Title VII administrative procedures. This court reasoned that since § 1985 did not create any right it provides a cause of action only when some otherwise defined federal right is breached by a conspiracy in a manner the statute proscribes. 442 U.S. at 376.

This court, however, established in Cannon, supra, that Title IX independently creates a right of action and is not merely a remedial statute to vindicate rights provided by some other law.

Even where Title IX protections against sex discrimination may be coextensive with the provisions of Title VII, remedies under Title IX may not be foreclosed without direct conflict with other precedent in this court.

"[The] legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes..." Johnson v.

Railway Express Agency, 421 U.S. 454, 459 (1975). "[E]ven if alternative remedies are available and their existence is relevant, but cf. Cannon,...this court has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination." North Haven, supra, 456 U.S. 512, 535 n. 26 (citations omitted).

The Congressional intent to permit coextensive and alternative means to redress employment discrimination was most recently demonstrated in the Civil Rights Act of 1991, which restored the viability of 42 U.S.C. § 1981 as a general prohibition of racial discrimination in employment, implying disagreement with the limitation of the use of that statute in Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

The Fifth Circuit found some support for its position in Brown v. General Services Administration, 425 U.S. 820 (1976), holding that Title VII is the exclusive judicial remedy for claims of discrimination in federal employment. 425 U.S. at 835. In Brown, however, this court did not depart from the principle in Johnson, supra, allowing an employee to pursue relief under Title VII or other federal or state statutes. Rather, it held Johnson inapposite to claims by federal employees because of problems of sovereign immunity and the specific language of Title VII upon its enactment, when federal employees were not covered.

Neither consideration applies to this case.

No claim of sovereign immunity is available as a result of the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7(a)(1).

As noted by the Fifth Circuit, 66 F.3d at 756, Title IX was enacted a few months after the Congress extended Title VII to cover state and local government employees stating in a House of Representatives report that the inclusion was not intended to abrogate the right of such government employees to sue under other laws prohibiting discrimination in employment.

The Fifth Circuit concluded that since the comment was directed at existing laws, then the Congress could not have meant it to apply to laws yet to be enacted. The opposite conclusion is much more tenable. The legislative history expresses a clear intent. Since the Congress could not be expected to comment on laws not yet enacted, it is more significant to note that when Title IX was enacted the Congress did not specify any departure from the previously announced principle of coextensive application of laws prohibiting discrimination.

The Fifth Circuit opinion raises issues cogently reasoned in Justice Powell's dissenting opinions in Cannon and North Haven. As shown below, since those opinions the Congress specifically has indicated an intent to allow both equitable and legal remedies for Title IX claims. As mentioned above, the Congress also has found no problem in the coextensive administrative and judicial remedies for race discrimination under Title VII and 42 U.S.C. § 1981.

The Fifth Circuit opinion accordingly appears to be plainly inconsistent with this court's jurisprudence and plenary review is warranted and necessary.

II. The Fifth Circuit decision also is in conflict with that of other circuits which have considered the same important matter after this court's decision in Franklin.

Amazingly, the Fifth Circuit opinion cites to decisions of other circuits for the proposition that Title IX claims should be considered under the same principles as Title VII without taking notice that in some of those cases other circuits did not have any problem with Title IX employment claims being made wholly independent of Title VII.

In Lipsett v. University of Puerto Rico, 864 F.2d 881, 896-97 (1st Cir. 1988), the First Circuit held that Title IX applied to employment-related claims of a surgical resident, who was both an employee and a student of the medical school. Interestingly, the First Circuit, in reaching that conclusion, relied on the same House report as the Fifth Circuit cited for the opposite result.

In Preston v. Commonwealth of Virginia ex rel New River Community College, 31 F.3d 203, 204-05 n. 1 (4th Cir. 1994), the court observed that it initially had not reached the question of whether a counselor employed by the community college could recover damages in addition to equitable relief under Title IX. The court noted, however, that after that initial decision, the Supreme Court had ruled in Franklin, supra, that compensatory damages were recoverable.

Indeed, after Franklin, supra, only the Fifth Circuit has held that Title IX does not provide an independent damages remedy for sex discrimination.

Even before Franklin, the Third Circuit had concluded that a damages remedy was

available under Title IX. In Pfeiffer v. Marion Center Area School District, 917 F.2d 779, 787-89 (3rd Cir. 1990), that court relied on this court's indication in Cannon, supra, that Congress intended to create remedies for Title IX comparable to those available under Title VI of the 1964 Civil Rights Act. The Third Circuit noted that in Guardians Ass'n v. Civil Service Commission of New York City, 463 U.S. 582 (1983), this court held that compensatory damages were available under Title VI for intentional discrimination.

This court granted certiorari in Franklin specifically to resolve the conflict between the Eleventh Circuit's holding that Title IX did not authorize an award of damages and the Third Circuit's opinion in Pfeiffer, which held damages were recoverable for sex discrimination in employment under Title IX. In Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 630 n. 9, this court held that a majority in Guardians had agreed that retroactive relief is available to private plaintiffs for all discrimination actionable under Title VI.

III. The Fifth Circuit opinion conflicts with public policy clearly stated by the Congress and presents serious obstacles to the implementation of that policy.

This case demonstrates that circumstances might impel an individual to seek judicial relief without first exhausting the remedies available under Title VII through the E.E.O.C.

In 1995, the E.E.O.C. reported a backlog of some 100,000 charges nationwide, as a consequence of which claimants faced long delays in the investigation of their complaints.

The medical school research professor in this case was faced with serious harm to her career and reasonably sued under a law which did not require the delay of administrative processing.

Because a similarly situated employee complaining of racial discrimination can sue under 42 U.S.C. § 1981 without first filing a charge with the E.E.O.C., the Fifth Circuit opinion creates a disparity of treatment between individuals complaining of race discrimination and those complaining of discrimination because of sex.

In abrogating the Eleventh Amendment immunity under Title IX and other statues proscribing discrimination, the Congress stated in the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7 that "remedies (including remedies both at law and in equity) are available" for unlawful discrimination by a State to the same extent as against a private entity.

In the Civil Rights Act of 1991, the Congress provided for compensatory and punitive damages, within certain limits, for race and other unlawful employment discrimination while restoring to full effect the use of 42 U.S.C. § 1981 to seek the same damages for race discrimination.

As Justice Scalia, joined by the Chief Justice and Justice Thomas, noted in concurring in the Franklin judgment, the 1986 act, enacted after Cannon, signals that it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate.

In Franklin, this court specifically resolved the issue with respect to a case

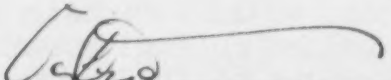
involving damages for sex discrimination in employment.

The Fifth Circuit opinion would impose unfair and disparate treatment between claimants of race and sex discrimination. It would unnecessarily force individuals needing immediate relief from sex discrimination to undertake long administrative proceedings. It is inconsistent with clear precedent of this court and with other circuit courts. It is inconsistent also with the national policy to eradicate unfair and unlawful employment discrimination through all available means.

CONCLUSION

The Fifth Circuit holding that Title VII remedies preclude a suit for damages under Title IX conflicts with relevant law of this court, conflicts with other circuit opinions, and impedes public policy on an important matter of law. Review and correction is vitally required.

Respectfully submitted,



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